No. 94-859

In the Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF INTERIOR, ET AL., PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES
FOR A GREAT OREGON, ET AL.

BRIEF OF *AMICUS CURIAE* ANDERSON & MIDDLETON LOGGING COMPANY, INC. IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

STATEMENT OF FACTS 4

I. FACTS CONCERNING UNITED STATES V. ANDERSON & MIDDLETON LOGGING COMPANY, INC 4

A. A&M's property 4

B. The Northern Spotted Owl Incidental Take Guidelines . . 4

C. The case against A&M 7

D. The case against A&M is based on the Northern Spotted Owl Incidental Take Guidelines 9

E. The case against A&M was filed with the knowledge and approval of the Secretary of Interior 10

F. Absence of direct proof for the United States' case against A&M 11

G. Threat of extinction is not an element of the harm regulation in the case against A&M 13

H. The United States' methodology in this case, which has been "formally endorsed" by the FWS, eliminates proof of actual injury or death and other important limitations in the definition of harm 14

1. The United States interprets the harm regulation to eliminate any need to prove that the challenged conduct "actually kills or injures wildlife." 14

2. The United States interprets the harm regulation to eliminate the need to prove any impact on living

animals where habitat modification reduces the reproduction rate of an animal population 16

3. The United States interprets the harm regulation to relax proof of impairment 17

4. The United States interprets the harm regulation to eliminate proof of significance 17

5. The FWS has formally endorsed the methodology for determining "take" that is being used against A&M 18

II. FACTS CONCERNING THE REGIONAL IMPACT OF THE HARM REGULATION THROUGH THE NORTHERN SPOTTED OWL INCIDENTAL TAKE GUIDELINES 18

A. The owl guidelines subject millions of acres of private land to federal regulation 18

B. The owl guidelines also subject other non-federal lands to federal regulation 21

ARGUMENT 21

THE COURT BELOW CORRECTLY HELD THAT THE HARM REGULATION IS NOT AUTHORIZED BY THE ESA 21

A. The harm regulation has brought millions of acres of private land under federal regulation, contrary to the intent of Congress 22

B. The harm regulation reverses a clear congressional choice in the ESA by subjecting private landowners to stricter and more inflexible regulation than federal land management agencies 24

C. The Secretary's broad interpretation of the harm regulation applied against A&M is further proof the

Secretary's interpretation of "harm" in the ESA is contrary to Congress' intent 27

D. The Court should not defer to the Secretary's interpretation of "harm" presented in this Court since it contradicts the interpretation the Secretary currently applies in enforcement of the regulation 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

Bankamerica Corp. v. United States,
462 U.S. 122 (1983) 29

Bowen v. Georgetown Univ. Hospital,
488 U.S. 204 (1988) 29

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 21, 28, 29

Good Samaritan Hospital v. Shalala,
-- U.S. --, 113 S. Ct. 2151,
124 L. Ed. 2d 368 (1993) 29

United Housing Foundation, Inc. v. Forman,
421 U.S. 837 (1975) 30

Statutes:

Endangered Species Act,
16 U.S.C. §§ 1531, *et seq.* . . . 1-4, 7, 9, 10, 21, 22, 24-27, 29

Regulations:

50 C.F.R. § 17.3 . . . . . 1, 23

50 C.F.R. § 17.31 9

50 C.F.R. § 402.02 25

Legislative History:

119 Cong. Rec. 25,682 (July 24, 1973) 24

H. R. Rep. No. 412, 93rd Cong., 1st Sess. at 11 (1973) 23

S. Rep. No. 307, 93rd Cong., 1st Sess. at 14 (1973) 24

Miscellaneous:

55 Fed. Reg. 26114 (June 26, 1990) 4

57 Fed. Reg. 1796 (January 15, 1992) 6

60 Fed. Reg. 9484 (February 17, 1995) 10, 18, 20, 22, 23

Carter, *A Dual Track for Incidental Takings: Reexamining Sections 7 and 10 of the Endangered Species Act*, 19 Envtl. Aff. 135, 161-63 (1991) 26

Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L. Rev. 277, 351-58 (1993) 26

Supreme Court Rule 37.3. 1

Washington Administrative Code
222-16-080(1)(h) 6

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BRIEF OF *AMICUS CURIAE* ANDERSON & MIDDLETON LOGGING COMPANY, INC. IN SUPPORT OF AFFIRMANCE

INTEREST OF AMICUS CURIAE[1]

Amicus Anderson & Middleton Logging Company, Inc. ("A&M"), a small family owned logging company in Hoquiam, Washington, is the defendant in a pending civil action filed by the United States in December 1993, seeking to enforce the Endangered Species Act ("ESA") "harm" regulation, 50 C.F.R. § 17.3, that is the subject of this case.

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[1] The parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

United States v. Anderson & Middleton Logging Company, Inc., No. C93-5697R (W.D. Wash.).

In its case against A&M, the United States seeks to enjoin the company from logging a 71 acre timberland tract owned by A&M, based on what it alleges would be the resulting harm to a pair of northern spotted owls believed to be in the Olympic National Park some 1.6 miles from the tract. The government claims that timber harvesting on A&M's property will "harm" the spotted owl pair in violation of the ESA. This brief advises the Court of the government's position in the case against A&M, and discusses the impact of the harm regulation in the three-state region inhabited by the northern spotted owl.

SUMMARY OF ARGUMENT

The United States is asserting against A&M an expansive interpretation of the harm regulation, which contrasts sharply, and irreconcilably, with the narrower position the Secretary of Interior has presented to the Court in this case. The U.S. Fish and Wildlife Service ("FWS") has "formally endorsed" the sweeping interpretation asserted against A&M.

In its suit against A&M, which the Secretary approved and announced in Washington, D.C., the United States has interpreted the ESA harm regulation to dispense with important limitations the Secretary relies on in this Court to preserve the regulation's validity. The Secretary has applied the broader interpretation consistently to private landowners and federal agencies alike in the owl region since 1990.

In this Court, the government claims the harm regulation "applies only if the habitat modification or degradation is significant and actually kills or injures protected wildlife." Brief for Petitioners at 28. Yet in its case against A&M, the United States asserts that the harm regulation: (1) does **not** require any proof of actual killing or injury; (2) does **not** require any impact on a living animal; and (3) does **not** require that habitat modification be significant.

The action against A&M seeks to enforce northern spotted owl "incidental take guidelines" issued by the FWS in July 1990. The owl guidelines assert federal regulatory control over more than three million acres of private timberland in three states, and purport to demand that more than one million acres of private timberland be preserved in perpetuity to provide habitat for this single subspecies.

As the court of appeals below correctly perceived, the harm regulation expands federal regulatory power under the ESA far beyond the rest of the statute, and far beyond congressional intent. The ESA requires federal agencies to protect critical habitat, while private landowners have no similar duty. The harm regulation impermissibly reverses this congressional choice by giving federal wildlife agencies more power over private property than over federal land.

The broad interpretation of "harm" advanced against A&M is clearly contrary to congressional intent. Further, the conflict between the enforcement practice in the field and the narrower interpretation offered the Court in this case reduces or eliminates the deference the Court can give the Secretary's litigating position here.

The court below correctly invalidated the harm regulation.

STATEMENT OF FACTS

I. FACTS CONCERNING UNITED STATES V. ANDERSON & MIDDLETON LOGGING COMPANY, INC.

A. A&M's property.

A&M has owned a 71 acre tract within the Quinault Indian Reservation on the Olympic Peninsula in Washington state for more than 34 years. A&M purchased the land for its timber, the land is zoned for timber production, and the land has no economic use except as timberland.

B. The Northern Spotted Owl Incidental Take Guidelines.

The FWS listed the northern spotted owl as a threatened species under the ESA, 16 U.S.C. §§ 1531, *et seq.*, in 1990. *See* 55 Fed. Reg. 26114 (June 26, 1990).

In July 1990, the FWS released a document entitled "Procedures Leading To Endangered Species Act Compliance For the Northern Spotted Owl." Joint App. at 36. This document included "incidental take guidelines under sections 7 and 10" which purported to describe logging practices on private land (and federal land) that would be considered an illegal take of northern spotted owls under ESA § 9. Joint App. at 41-44. The logging practices which the FWS claimed would cause a take included logging which reduced "suitable spotted owl habitat" (certain forest stands more than 40-80 years old) to less than: (1) 70 acres surrounding a nest site; (2) 500 acres within a 0.7 mile radius of a nest site; or

(3) 40% of a larger circle around a nest site ranging from a 1.2 mile radius in California and southern Oregon to a 2.2 mile radius on the Olympic Peninsula in Washington. *Id.* These "take circles" are equal in size to the median "home range" of several small samples of owls studied in the 1980's.

The guidelines assume each pair of spotted owls occupies a "home range" in the shape of a circle equal in size to the median home range of a sample group of birds, and that each pair of owls needs 40% suitable habitat within the circle to survive and reproduce.

Between 1992 and 1993, the FWS discovered that its 2.2 mile radius take circle for the Olympic Peninsula reflected a computational error. Correcting this error led the FWS to increase the circle size on the Olympic Peninsula from a 2.2 to a 2.7 mile radius.

In 1991, the Sweet Home Chapter of Communities for a Great Oregon filed a lawsuit in Washington, D.C. (a companion to this case) challenging the owl guidelines on the ground they were a regulation adopted without notice and comment.[2] The FWS "rescinded" the owl guidelines in October, 1991 in response to this lawsuit.[3] The district court

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[2] *Sweet Home Chapter of Communities For a Great Oregon v. Turner*, Civil Action No. 91-2218 NHJ (D.D.C. August 30, 1991).

[3] Deposition of Marvin Plenart (August 3, 1994) at 79, 84. Mr. Plenart was from 1989 to 1994 the regional director of FWS for the region encompassing Washington and Oregon. *Id.* at 8-9. All deposition citations are to transcripts of depositions conducted in *United States v.*

(continued...)

court dismissed the case as moot, finding that the "FWS declared that the Guidelines were rescinded, thereby clearly indicating its intention no longer to apply or enforce them."[4]

Based on the rescission of the owl guidelines, the Washington Department of Natural Resources ("WDNR"), which regulates private forest management in the state, decided in 1992 to stop enforcing the large take circles against private landowners, and adopted a new rule requiring adherence to the 70 acre and 500 acre components of the rescinded guidelines.[5]

In January 1992 the FWS designated some six million acres of critical habitat for the northern spotted owl -- all on federal land.[6] The designation exempted all private land from critical habitat, including A&M's property.[7]

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[3] (...continued)
Anderson & Middleton Logging Company, Inc. The United States Attorney for the Western District of Washington has a copy of all cited transcripts and pleadings, which *amicus* can provide to the Court upon request.

[4] *Sweet Home Chapter of Communities For a Great Oregon v. Turner*, Civil Action No. 91-2218 NHJ, Memorandum Order (D.D.C. February 27, 1992) at 4, 5.

[5] *See* Washington Administrative Code 222-16-080(1)(h).

[6] 57 Fed. Reg. 1796 (January 15, 1992).

[7] *Id.* at 1807-08.

C. The case against A&M.

In 1991, A&M began making plans to harvest the trees on its 71 acre tract. It applied for a forest practices permit from the WDNR, and also sought a permit from the Quinault Nation.

WDNR issued a forest practices permit to A&M in 1992, determining that the 71 acre tract was not within 0.7 miles of a spotted owl nest site.[8] A&M also obtained the necessary forest practice permit from the Quinault Nation. Thus, A&M was fully authorized by state law and tribal authority to log the tract in 1992.

However, in December 1992, an FWS enforcement officer telephoned the president of A&M at his home. The FWS agent accused the company of violating the ESA, and informed him that A&M could be subject to criminal prosecution for illegally taking a pair of northern spotted owls known as the "Queets River Lower" pair, believed to be nesting some 1.6 miles from the tract. When it was clarified that A&M had not yet harvested the timber on its land, the FWS claimed that any exercise by A&M of its logging permit would be viewed as an illegal take of the owls. According to the FWS, logging by A&M would result in a take because there already was less than 40% suitable habitat within a 2.2 mile radius circle[9] of the owls' nest

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[8] Complaint, *United States v. Anderson & Middleton Logging Company, Inc.*, ¶ 16 (December 9, 1993).

[9] The FWS had not yet discovered its computational error which later caused it to increase the circle size for the Olympic Peninsula from a 2.2 to a 2.7 mile radius.

site.[10] A&M ultimately agreed to defer logging its tract to allow the FWS time to investigate the matter more thoroughly.

After the passage of nearly a year with no resolution of the FWS "investigation," A&M decided it could wait no longer to begin logging its tract. Because of the FWS' warnings and A&M's concerns about risking criminal sanctions, A&M sent written notification to the United States Attorney's office in Seattle in November of 1993 advising of its intent to begin timber harvesting.[11] On December 9, 1993, the United States Attorney, at the request of the FWS, filed a civil action against A&M to enjoin the planned logging, based on the harm regulation.[12] The complaint sought a temporary restraining order and preliminary and permanent injunctions against logging the tract. The United States alleged logging by A&M would result in the following "actual injury":

> The result of the removal of this timber will be to force the Queets River Lower pair to range farther to find replacement suitable habitat in which to forage. With this forced modification of their behavior comes the

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[10] Declaration of E. Charles Meslow at ¶¶ 8-20 (December 30, 1993).

[11] Complaint, *United States v. Anderson & Middleton Logging Company, Inc.*, ¶ 19 (December 9, 1993).

[12] While the complaint also initially claimed the logging would unlawfully "harass" the owls, the United States later abandoned the "harass" theory and has proceeded solely on the "harm" claim.

> attendant side effects including impairment of reproductivity and, in a worse case scenario, death by starvation or exposure to predators.[13]

The complaint does not allege, and the United States admits that it has no evidence, that the Queets River Lower owl pair has ever been on the A&M tract.[14]

D. The case against A&M is based on the Northern Spotted Owl Incidental Take Guidelines.

The complaint against A&M relies entirely on the take circle concept in the "rescinded" owl guidelines. Based on its revised 2.7 mile take circle for the Olympic Peninsula, the FWS claims that logging which would leave less than 5,708 acres of suitable owl habitat (40% of the take circle) within 2.7 miles of the Queets River Lower pair of owls is a take. Since, according to the FWS, there already is less than 5,708 acres of suitable habitat remaining within that circle, it claims that logging the 71 acre A&M tract will harm the owls and therefore illegally take them under 16 U.S.C. § 1538 and 50 C.F.R. § 17.31 (applying "take" prohibitions to threatened species).

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[13] Complaint, *United States v. Anderson & Middleton Logging Company, Inc.*, ¶ 21 (December 9, 1993). A preliminary injunction has been entered deferring logging until trial. The trial has been postponed due to congressional interest in transferring the property to federal ownership.

[14] United States' Responses to Defendant's Preliminary Interrogatories, Interrogatory No. 1 (January 11, 1994).

The FWS based its internal investigation of A&M entirely on the "rescinded" owl guidelines. The FWS biologist who worked up the A&M case testified that the official who rescinded the guidelines instructed him in 1991 to continue to use the guidelines internally to assess illegal take by private citizens and federal agencies, and that the only change after their "rescission" was that the guidelines were no longer handed out to the public.[15]

FWS no longer denies that is continuing to enforce the take circles in the "rescinded" guidelines. In February 1995, the FWS proposed an amendment to its regulations under § 4(d) of the ESA, 16 U.S.C. § 1533(d), to eliminate the spotted owl take circles in some areas in Washington and California. 60 Fed. Reg. 9484 (February 17, 1995). The notice explained the rule was "in response to the President's directive to review the blanket set of incidental take prohibitions for the northern spotted owl that has been in effect since the listing." *Id.* at 9489. Those prohibitions are the incidental take guidelines.

E. The case against A&M was filed with the knowledge and approval of the Secretary of Interior.

The day after the complaint against A&M was filed, the Secretary of Interior issued a press release in Washington, D.C. announcing the filing of the case.[16]

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[15] Deposition of James Michaels (June 16, 1994) at 27-28. Mr. Michaels has served since 1985 as the FWS' endangered species coordinator for the state of Washington. *Id.* at 8-9.

[16] Department of the Interior, Office of the Secretary, News Release at 3 (December 10, 1993).

F. Absence of direct proof for the United States' case against A&M.

The FWS action against A&M is not based on any actual information about the pair of owls that A&M's logging supposedly will "harm." No federal official visited the property before the suit was filed. There is no evidence the owls have ever been on A&M's property. At the time the United States filed the suit, the owls in question had not been seen for over 18 months. The United States subsequently admitted it could not establish that the owls still exist.[17]

The case is based entirely on the biological concepts in the owl guidelines. The United States admits that the biological methodology in the owl guidelines "is not described in any published, peer-reviewed scientific journal, [and] has never been subject to scientific peer review."[18]

1. The United States admits it has no knowledge about the actual size and shape of the Queets' River Lower pair's home range.[19] The contention on which it premised the lawsuit -- that the A&M tract is within the home range of the owl pair -- is based entirely on a string of assumptions built on the data of 10 other owl pairs studied on the Olympic Peninsula between 1987 and 1989.[20] The government also

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[17] Deposition of E. Charles Meslow (July 5, 1994 and August 9, 1994) at 126, 217. Dr. Meslow was designated as the United States' expert in the case against A&M. *See infra* at 14 and n.31.

[18] Response to Request For Admission No. 9 (August 6, 1994).

[19] Response to Request For Admission No. 4 (August 6, 1994).

[20] *Id.*

admits, however, that the 10 owl pairs studied are not a random sample of owls on the Olympic Peninsula, and that it cannot verify if these 10 locations are an accurate representation of owl home ranges.[21]

2. The government admits there is no scientific basis for using median home range size to define the area in which an illegal take of a northern spotted owl could occur. There has been no statistical analysis of the validity of this concept.[22] The median was used as a "management prescription,"[23] and proves nothing about the actual size of a home range for a particular pair of owls.[24]

3. The United States admits it is "highly unlikely" that the actual home range of any pair of spotted owls is a circle, and also admits that the shape of a home range is likely to be influenced in part by the unique geographic distribution of suitable habitat that is available.[25]

4. The United States admits the 40% suitable habitat requirement is "primarily based" on a single paper by two

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[21] Deposition of Dr. Eric Forsman at 18-22. Dr. Forsman, a spotted owl biologist employed by the Pacific Northwest Research Station of the U.S. Forest Service, collected the data on the 10 owl pairs. *Id.* at 9.

[22] Meslow Deposition at 171-72.

[23] *Id.* at 175.

[24] *Id.* at 175.

[25] Response To Request For Admission No. 6 (August 6, 1994).

biologists published in 1992.[26] However, both authors have stated that the paper does not support the 40% suitable habitat requirement.[27]

The United States has no evidence that owls on the Olympic Peninsula need 5,708 acres of suitable habitat to survive and reproduce.[28] It concedes that a significant proportion of owls are capable of reproducing in areas with less than 40% suitable habitat, and that this has occurred in hundreds of cases.[29]

G. Threat of extinction is not an element of the harm regulation in the case against A&M.

The case against A&M under the harm regulation does not involve any threat of the extinction of the northern spotted owl subspecies. The United States admits that "logging the Anderson & Middleton property will not cause the extinction of the northern spotted owl subspecies."[30]

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[26] Response to Request For Admission No. 7 (August 6, 1994).

[27] Forsman Deposition at 75-78; *see* Michaels Deposition at 115-20.

[28] Forsman Deposition at 79.

[29] Meslow Deposition at 226-28.

[30] Response to Request For Admission No. 1 (August 6, 1994).

H. The United States' methodology in this case, which has been "formally endorsed" by the FWS, eliminates proof of actual injury or death and other important limitations in the definition of harm.

The United States designated Dr. E. Charles Meslow, a biologist with the National Biological Survey (formerly with the FWS), as its expert at trial.[31] Dr. Meslow testified to the interpretation of the harm regulation that he applied in determining that A&M's proposed logging is illegal. His interpretation: (1) eliminates the requirement that the challenged conduct "actually kills or injures wildlife"; (2) views reduced reproduction rates for an animal population as harm even where there is no impact on any living animal; (3) treats any lessening in a behavioral pattern as an impairment; and (4) eliminates the requirement that any impairment in an animal's behavioral patterns is "significant."

1. The United States interprets the harm regulation to eliminate any need to prove that the challenged conduct "actually kills or injures wildlife."

Dr. Meslow testified as follows:

> Q. Do you have an understanding of the term "actually kills or injures wildlife" under the definition in the Endangered Species Act?
>
> ...

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[31] Designation of E. Charles Meslow as Expert Witness for the Government (July 18, 1994).

A. The pertinent part for this is that it may include significant habitat modification that leads to alteration of behavior.

...

Q. Does there have to be actual killing or injury?

A. No.

...

Q. So modifying the behavior is actual killing or injury; is that what you are saying?

A. Yes.

...

Q. ... If you identify an act which significantly impairs essential behavioral patterns, is it your understanding that you have thereby identified an act that harms wildlife within the meaning of the definition?

A. Yes.[32]

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[32] Meslow Deposition at 75-76, 109-110, 113 (objection of counsel omitted).

2. *The United States interprets the harm regulation to eliminate the need to prove any impact on living animals where habitat modification reduces the reproduction rate of an animal population.*

Dr. Meslow interprets the essential behavioral pattern of "breeding" in the harm regulation to "include not just the behavior of breeding, but the result of that breeding."[33] The regulation treats lack of breeding success as an impairment of an essential behavioral pattern, although it does not actually kill or injure any living animal:

> Q. How does breeding success or reproduction actually kill or injure wildlife?
>
> A. It would be the lack of breeding success that would kill or injure the population.
>
> ...
>
> Q. Does lack of breeding kill or injure the Queets River Lower owls?
>
> A. No. Their continued existence as individual owls is relatively independent of their success in breeding, but without having successful breeding, they make no contribution and they are only space -- they're only taking up space and actually could be precluding the presence of a pair that might be able to successfully breed.
>
> ...

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[33] *Id.* at 80.

Q. [Interfering with reproduction] would not affect existing owls, correct?

A. I agree with you.[34]

3. The United States interprets the harm regulation to relax proof of impairment.

Dr. Meslow defines the term "impairing" in the harm regulation to mean "[d]iminishing, interfering with, lessening, in a negative sense."[35] Thus, any lessening of a behavioral pattern is an impairment under the regulation.

4. The United States interprets the harm regulation to eliminate proof of significance.

Dr. Meslow interprets the word "significantly" in the second sentence of the harm regulation (in the phrase "significantly impairing essential behavioral patterns") to mean "biologically significant" rather than "statistically significant."[36] He can think of no impairment of an essential behavior pattern that is not "significant,"[37] and he believes that "by the time a biologist would recognize that impairment has taken place, I think it would be a significant impairment."[38]

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[34] *Id.* at 84-85, 87.

[35] *Id.* at 108-09.

[36] *Id.* at 94-95.

[37] *Id.* at 95.

[38] *Id.* at 95-96.

5. The FWS has formally endorsed the methodology for determining "take" that is being used against A&M.

The government admits that "[t]he scientific methodology used by the United States to determine take in this case has been formally endorsed by the United States Fish and Wildlife Service."[39]

II. FACTS CONCERNING THE REGIONAL IMPACT OF THE HARM REGULATION THROUGH THE NORTHERN SPOTTED OWL INCIDENTAL TAKE GUIDELINES.

A. The owl guidelines subject millions of acres of private land to federal regulation.

The result of the harm regulation, as applied through the spotted owl incidental take guidelines, is to grant the FWS (and the federal courts, in citizen suits) power to regulate more than three million acres of private timberland in the three-state region by restricting, or prohibiting, the only economically feasible use of these lands -- producing timber.

Of 5,431 known northern spotted owl site centers in the United States, over 1,300 site centers are located on non-federal land.[40] More than 800 site centers are on private land.

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[39] Response to Request For Admission No. 9 (August 6, 1994). This admission was made after Dr. Meslow described his approach to take at his deposition.

[40] 60 Fed. Reg. at 9495 (February 17, 1995).

In Washington, at least 86 known spotted owl sites are on private land.[41] Under the owl guidelines, the take circles for these sites are 6,600-14,271 acres in size. Within each circle, 40% of the acreage (2,640-5,708 acres) must be maintained as spotted owl habitat to avoid a take. Joint App. at 44; *supra* at 4-5. This brings over 500,000 acres of private land in Washington under federal control through the harm regulation.

In Oregon, 128 spotted owl nest sites exist on private land,[42] each encompassing a take circle of 2,500-3,400 acres in size in which 1,000-1,360 acres of habitat must be preserved. This gives the FWS regulatory control over some 375,000 acres of private land in Oregon.

In California, over 630 spotted owl nest sites are located on private land in the heavily timbered northern part of the state.[43] The owl guidelines require a take circle of 2,500 acres in a 1.2 mile circle around each of these sites, in which 1,000 acres of habitat must be preserved, bringing some 1,575,000 acres of private land in California under federal regulatory control.

Thus, the harm regulation presently subjects almost 2.5 million acres of private land in Washington, Oregon, and

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[41] Final Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl ("FSEIS") (U.S. Departments of Agriculture and Interior) (February 1994) at D-5.

[42] *Id* at D-7.

[43] *Id.* at D-8.

California to FWS supervision and control. One million acres of this private timberland must, under the owl guidelines, be preserved at all times to avoid any "harm" to northern spotted owls.

These figures do not fully define the harm regulation's reach onto private land. Throughout much of the spotted owl region, private land and federal land are closely intertwined. Drawing a 1.2-2.7 mile circle around many spotted owl sites on **federal land** brings hundreds of thousands of additional acres of private land under federal control. The FWS recently reported that 1,165 spotted owl sites on federal land "are dependent upon some percentage of suitable habitat on adjacent non-Federal lands to support the owls."[44]

The government's case against A&M illustrates this situation. The United States sued A&M to preserve privately-owned habitat for the Queets River Lower owl pair although the owls were believed to be located on federal land in the Olympic National Park. Upwards of one million acres of similarly intermingled private and federal timberlands are also subject to FWS regulation through the harm regulation.

In total, the harm regulation as applied through the spotted owl incidental take guidelines gives the FWS regulatory power over more than three million acres of private timberland in the three-state region.

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[44] 60 Fed. Reg. at 9495 (February 17, 1995).

B. The owl guidelines also subject other non-federal lands to federal regulation.

The harm regulation also subjects other non-federal lands, owned by the states, counties and municipalities, to federal regulation through the owl guidelines. There are at least 39 spotted owl sites on such lands in Washington, 27 sites in Oregon and nine sites in California,[45] bringing over 350,000 acres of state, county and municipal land under FWS regulation. Large amounts of tribal lands are also subject to the guidelines.

ARGUMENT

THE COURT BELOW CORRECTLY HELD THAT THE HARM REGULATION IS NOT AUTHORIZED BY THE ESA

Under "Step One" of the *Chevron* analysis, the Court "must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Under "Step Two" of the *Chevron* analysis, even if Congress' intent is not clear, the court must reject an agency construction that is not "a reasonable interpretation." *Id.* at 844.

Under either step of the *Chevron* analysis, the Court should reject the harm regulation. It is contrary to unambiguous congressional intent, and it is unreasonable when measured against Congress' goals in the ESA.

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[45] FSEIS, *supra* n.41, at D-4-D-8.

A. The harm regulation has brought millions of acres of private land under federal regulation, contrary to the intent of Congress.

The majority below correctly understood that the Secretary's interpretation of "harm" in § 9 vastly expands the reach of the ESA to bring millions of acres of private land under federal regulation and control. Pet. App. 91a. While the Secretary's brief attempts to minimize the actual impact of the harm regulation on private land, Brief for Petitioners at 47-49, the real effect of the harm regulation, as shown by the spotted owl guidelines, is precisely as the court below understood it.

The owl guidelines brought over three million acres of private land in Washington, Oregon and California under immediate federal regulatory control. *See supra* at 18-20. Millions more acres are subject to federal control if a spotted owl relocates or is discovered on or near the land. The federal control is total: the FWS may prohibit the only viable use of the land -- timber production -- or may condition it (in the unlikely event a land owner goes through the expensive, time consuming, and rarely successful effort to obtain a § 10 incidental take permit), on any restrictions, limitations or harvesting procedures the agency may choose. 16 U.S.C. § 1539.

The government itself acknowledges the current reach of the harm regulation in the owl region in its recent regulatory proposal under § 4(d) of the ESA. 60 Fed. Reg. 9484. The FWS estimates that at least 6.5 million acres of non-federal forest **in the state of Washington alone** are currently or potentially subject to federal regulation under "present

incidental take prohibitions for owls." *Id.* at 9499.[46] The proposal would lift the larger take circles on 5.24 million acres in Washington, leaving them in place on 1.3 million acres. *Id.* The proposal would also leave the take circles in effect everywhere in Oregon and in parts of California. *Id.* at 9485, 9504.

Without the harm regulation, the FWS claims no statutory authority to regulate these millions of acres of private land to protect a single subspecies. The only other term in the statute that the FWS has ever cited to support restrictions on habitat modification is "harass." *See* Joint App. at 42. Yet the FWS has never interpreted "harass" to include habitat modification, as it does "harm". *Compare* 50 C.F.R. § 17.3 definition of "harass" with definition of "harm". In adopting the "harm" and "harass" definitions in 1975, the FWS stated that the prohibition on environmental degradation was removed from the definition of "harass" and moved to the definition of harm. Joint App. at 50-51.[47]

Thus, the Secretary is forced to argue that when Congress added the term "harm" to the definition of "take" in § 9 of

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[46] The notice expressly acknowledges concern over the present applicability of "the requirement that 40 percent suitable habitat be left within a home range circle," 60 Fed. Reg. at 9489, and repeatedly recognizes by implication the application of the owl guidelines. *See, e.g., id.* at 9502 ("the Service generally would retain existing incidental take protection for owls located within [certain areas]."); *id.* at 9485 ("current incidental take restrictions would be retained").

[47] Congress' only expressed intent regarding the interpretation of "harass" was in relation to birdwatching, far removed from habitat modification. H. R. Rep. No. 412, 93rd Cong., 1st Sess. at 11 (1973).

the ESA in a package of "technical and clarifying amendments," 119 Cong. Rec. 25,682 (July 24, 1973), it intended to greatly expand the ESA's reach beyond what it was before the word was added.[48]

Yet not one member of Congress, including the sponsor of the "technical and clarifying" Senate amendment adding "harm" to the bill, nor any committee report, ever suggested that the term "harm" vastly broadened the "take" definition to encompass federal regulation of millions of acres of private land that otherwise was beyond federal control. Nothing in the words or legislative history of "harm" shows any congressional intent for this single word to support federal regulation of millions of acres of private property.

B. The harm regulation reverses a clear congressional choice in the ESA by subjecting private landowners to stricter and more inflexible regulation than federal land management agencies.

The court of appeals below correctly found that the harm regulation displaces a congressional judgment in the ESA to

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[48] Prior to adding "harm" in the definition, the Senate Committee had explained that it understood "take" to be defined "in the broadest possible manner," S. Rep. No. 307, 93rd Cong., 1st Sess. at 14 (1973). This legislative history strongly implies Congress did not believe habitat modification could even possibly be encompassed by the prohibition on "take." At the time the committee wrote the report, habitat modification was **not** prohibited within the term "take." Congress could not have believed the term was defined in the "broadest possible manner" at that point if Congress had thought it was "possible" that habitat modification **could** be prohibited as a take. Congress must have believed that it could not prohibit habitat modification within the term "take." Nothing suggests adding the word "harm" changed this belief.

impose greater habitat protection duties on federal land than on private land. Pet. App. 92a-93a. The Secretary disputes that conclusion in his brief. Petitioner's Brief at 41-44. Again, the court below was correct.

Congress addressed habitat protection in the ESA through designation of "critical habitat" in 16 U.S.C. § 1533(a)(3).[49] In a clear legislative choice, Congress gave private landowners no legal duty to protect critical habitat for a listed species, while requiring federal agencies to insure their actions are not likely to result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). Yet enforcement of the harm regulation achieves the contrary result by placing **substantially greater** regulatory restrictions on private land than the ESA places on federal land.

The FWS has determined that it will approve destruction or modification of critical habitat as long as jeopardy to a protected species is not likely to result.[50] If a federal action passes the jeopardy test, the FWS **must** grant the agency an incidental take authorization under § 7(b)(4). Unlike a private citizen seeking a permit under § 10, the federal agency need not submit and assure funding for a conservation plan, need not propose mitigation, need not minimize the

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[49] Congress also authorized federal agencies to purchase desired habitat from private landowners, 16 U.S.C. § 1534, a power that was largely unnecessary if private landowners were already compelled to allow the federal agencies to control the use of their land.

[50] *See* 50 C.F.R. § 402.02 (definitions of "destruction or adverse modification" and "jeopardize the continued existence of").

impacts of the taking and need not provide any other assurances to the FWS. *Cf.* 16 U.S.C. § 1539(a)(2).[51]

Thus, while a federal agency is free to destroy critical habitat as long as jeopardy to a species is avoided, the harm regulation prohibits private citizens from modifying millions of acres of non-critical habitat on private land without going through the costly, time consuming and highly uncertain incidental take permit process.

These contrasting procedures have revealed themselves tellingly in the case against A&M. Just four months before the United States sued A&M under the harm regulation to protect the Queets River Lower pair of owls, the FWS reviewed a Bureau of Indian Affairs ("BIA") proposal to conduct a 75 acre clearcut logging operation about one mile away from the A&M property -- within the same take circle for the same pair of owls. Finding that the BIA logging would not jeopardize the northern spotted owl subspecies, FWS granted the BIA incidental take authorization, with no restrictions of any kind, to "take" the Queets River Lower pair of owls.[52] Although the United States admits logging the A&M tract also will not jeopardize the northern spotted owl, it is suing A&M under the harm regulation to stop

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[51] The difficulty of a private citizen obtaining an incidental take permit under ESA § 10, as compared to a federal agency obtaining authorization under § 7, is further discussed in Carter, *A Dual Track for Incidental Takings: Reexamining Sections 7 and 10 of the Endangered Species Act*, 19 Envtl. Aff. 135, 161-63 (1991); and Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L. Rev. 277, 351-58 (1993).

[52] Michaels Deposition at 176-81.

logging virtually identical to the federal logging it previously approved -- to protect a pair of owls it already authorized the BIA to take.

This disparity between treatment of private citizens and federal agencies is not an isolated case. Between 1990 and 1994, the FWS authorized federal agencies to take some 1,500 pairs of northern spotted owls by logging within take circles on federal land.[53] In contrast, since 1990 the FWS has issued only one incidental take permit to a private company for logging in spotted owl habitat.

Thus, the harm regulation subjects the owners of more than three million acres of private "non-critical" owl habitat to more rigorous FWS control than the federal land management agencies receive on the six million acres of federal "critical" habitat. Imposing this greater burden on private landowners reverses Congress' clear decision to require federal agencies, but not private citizens, to protect habitat for listed species. 16 U.S.C. § 1536(a)(2).

C. The Secretary's broad interpretation of the harm regulation applied against A&M is further proof the Secretary's interpretation of "harm" in the ESA is contrary to Congress' intent.

The primary argument offered by the Secretary in this Court to save the harm regulation is a narrow interpretation that emphasizes three purported limitations in its language: "under the Secretary's interpretation, [the harm regulation] applies only if the habitat modification or degradation is [1]

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[53] Plenart Deposition at 146-47.

significant and [2] **actually kills or injures** [3] **protected wildlife**." Brief for Petitioners at 28 (emphasis and numbering added); *see id.* at 16, 20, 21, 29, 30-31, 41, 45.

Yet in its administrative practice, the FWS applies none of these limitations in enforcing the harm regulation:

1. No proof is required that the challenged conduct "actually kills or injures." The impairment of an essential behavioral pattern is enough, without more, to violate the regulation. *Supra* at 14-15.

2. No proof of impact on an existing animal is required. A reduction in an animal population's reproductive rate violates the harm regulation even though no existing animal is affected. *Supra* at 16-17.

3. "Significance" has disappeared entirely: any observable lessening of an essential behavioral pattern violates the rule. *Supra* at 17.

The FWS has employed this broad interpretation of the harm regulation consistently since publishing the northern spotted owl guidelines in 1990, Joint App. at 42-44, and continues to do so at the present time even while it asserts contrary views in this Court.

The broad interpretation given the regulation in practice confirms how far from congressional intent the FWS has moved. Regulating private land management that, in many cases, has no effect on any protected animal is "contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9.

D. The Court should not defer to the Secretary's interpretation of "harm" presented in this Court since it contradicts the interpretation the Secretary currently applies in enforcement of the regulation.

Even if the Court reaches step two of the *Chevron* analysis, the Court should not give deference to the interpretation of the statute offered by the Secretary in this Court because that interpretation so fundamentally contradicts the position the FWS has "formally endorsed" in its case against A&M, and has used in ESA enforcement for years.

This Court will not blindly defer to an agency's revised interpretation of a statute or regulation that is tailored to win a case in this Court:

> ... [T]he consistency of an agency's position is a factor in assessing the weight that position is due. As we have stated, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."

Good Samaritan Hospital v. Shalala, -- U.S. --, 113 S. Ct. 2151, 124 L. Ed. 2d 368, 382-83 (1993) (citations omitted).

The Court may decline to give any deference to an agency litigating position that contradicts the agency's administrative practice. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988). "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Id.* at 213; *accord, Bankamerica Corp. v. United States*, 462 U.S.

122, 130-32 (1983); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 858 n.25 (1975). Here the Court should decline to give any weight to the Secretary's interpretation of the term "harm" in light of his current inconsistent and contradictory construction of the term in the spotted owl guidelines and in the enforcement action against A&M.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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